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**RESPONSIBILITY OF SOLICITORS CONCERNING
UNDUE INFLUENCE ISSUES**

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Introduction

A drafting solicitor may be sued for professional negligence if his or her client was unduly influenced in the drafting, preparation or arrangement for execution of testamentary documents or other estate planning documents such as power of attorneys. The question of whether or not a solicitor in such scenario will be found negligent is not clear, and is likely dependant on the evidence and findings in the particular surrounding circumstances of each case. This paper will examine and consider 'best practices' in the avoidance of negligence and will attempt to identify the nature and scope of a drafting solicitor's duty and standard of care where undue influence issues are at play.¹

Overview: The Doctrine of Undue Influence

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions or estate documents where an individual exerts such influence on the testator, grantor or donor that it cannot be said that his/her decisions are wholly independent. Modern case law confirms that the doctrine related not only to testamentary documents but also extends to other planning instruments such as powers of attorney and gifts and other types of transaction.

Undue influence may be found where one person has the ability to dominate the will of another, whether through manipulation, coercion, or the outright but subtle abuse of power.² In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties".³ Specifically the courts will examine whether an imbalance of power existed in the relationship.

¹ For the general duty of drafting solicitors in the estate planning context, see for example *Murphy v. Lampier* 1914 31 O.L.R. 287; *Demarco v. Ungaro* 1979 CarswellOnt 671 (S.C.) and *McCullough v. Riffert* 2010 ONSC 3891.

² See *Dmyterko Estate v. Kulikovsky*, (1992) CarswellOnt 543 (S.C.).

³ *Fountain Estate v. Dorland* 2012 BCSC 615 at para. 64 citing *Goodman v. Geffen*, [1991] 2 S.C.R. 353.

The burden of proof of undue influence is on the allegor, for example, the attackers of the Will, testamentary document or other transaction, to prove that the mind of the testator was “overborne by pressure exerted by another person so as to negative the transaction. It is not enough to show mere persuasion; the influence exerted on the testator must amount to coercion to be undue influence. Coercion has been defined to mean that the testator has been put in such a condition of mind that if he could speak his wishes to the last he would say, ‘this is not my wish but I must do it.’”⁴

The drafting solicitor must be aware of the indicia of the potential for undue influence to be in a position to advise the client on the lawfulness of the transaction, and perhaps assist in avoiding the undue influence or at the very least to document any concerns. In ***Gironda v. Gironda* 2013 ONSC 4133** (discussed below) the Court provided a (non-exhaustive) list of indicators to guide us. These factors include the following:

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.⁵

In Brief: Undue Influence and Capacity

Notably, where capacity or incapacity is at issue, “*the legal threshold becomes higher and calls for more careful probing of the testator’s rationale at the time of the execution of a Will in particular, where circumstances are automatically more complex and there is the added suggestion of undue influence*”.⁶

⁴ *The Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) at p.42 ; see also *Vout v. Hay* [1995] 2 SCR 876 and *Kohut Estate v. Kohut*, (1993) 90 Man. R. (2d) 245 (Q.B.).

⁵ *Gironda v. Gironda* 2013 ONSC 4133 at para. 77.

⁶ Treatment in Psychiatry, Assessment of Testamentary Capacity and Vulnerability to Undue Influence, Am J Psychiatry 164:5, May 2007, by Kenneth I. Shulman, Carole A. Cohen, Felice C. Kirsh, Ian M. Hull and Pamela R. Champine, page 723

Historically, the notion of undue influence emphasized the concept of coercion. The term “subversion” of will has been applied and is perhaps a more fitting description. “*Subversion allows for a continuum of influence depending on the extent of cognitive impairment...*” in cases where capacity is in question. The relationship between cognitive capacity and the notion of influence is important to examine in determining thresholds.⁷

Solicitor’s Negligence Claims Arising from Circumstances of Undue Influence

The majority of decisions involving undue influence issues focus on whether or not undue influence exists, and if so, its effect on the rights of the parties directly involved and any transaction conducted, such as the validity of wills and powers of attorney or transfers of property involving older adults. Amongst these decisions, there are very few reported cases where negligence claims were brought against the drafting solicitor. A selection of these cases are discussed below.

The complex and lengthy reported decision of ***Hussey v. Parsons*, 1997 CarswellNfld 349 (SCTD)** involves a claim brought by an elderly widow against her former solicitor for professional negligence. As set out in the 300-page decision, the plaintiff alleged, among other things, that her husband’s solicitor had breached his duty by drafting an agreement transferring the sale proceeds of her house (her major asset) to her nephew. The solicitor also drafted a will under which the nephew was a major beneficiary. The widow alleged that the solicitor knew, or ought to have known, that she was being unduly influenced by her nephew and that he had failed to ensure her wishes were represented. The plaintiff argued that where a solicitor knew, or ought to have known, that there was actual, or the potential for the existence of undue influence the solicitor has a “heightened” or “higher ‘content’ of” duty of care.⁸

⁷Treatment in Psychiatry, Assessment of Testamentary Capacity and Vulnerability to Undue Influence, Am J Psychiatry 164:5, May 2007, by Kenneth I. Shulman, Carole A. Cohen, Felice C. Kirsh, Ian M. Hull and Pamela R. Champine, page 723

⁸ *Hussey v. Parsons*, 1997 CarswellNfld 349 (SCTD) at para. 515, hereinafter [*“Hussey”*]

Overview:

In this case, the court concluded that the transaction as it concerned the drafting of a written agreement was not “unconscionable”, nor was there actual undue influence exerted. The court concluded that with regard to any presumption of undue influence which might arise in the circumstances, the surrounding facts were such as to rebut that presumption. Thus, the plaintiff’s claim respecting the execution of the agreement relying on the fact of actual or presumed undue influence or unconscionability is answered⁹.

Moreover, the court held that there was no basis on which to find that the agreement failed to reflect the instructions and wishes of what the client actually communicated to her lawyer.¹⁰

As to the execution of the agreement the court found it not to be ‘complicated’ such that the client (plaintiff) was aware of the nature of the agreement. The court however did find it was incumbent upon the solicitor to ensure the agreement was reviewed carefully and precisely and was not persuaded that this had taken place. On this basis the court found the solicitor had been negligent in relation to the execution of the relevant document.¹¹

Facts:

The nephew contacted the solicitor and brought the plaintiff (and her later deceased husband) to his office. The solicitor testified that he had met with the plaintiff alone (with the nephew in the waiting room) and that she “presented as clear, forceful, and fully understanding of, and comprehending the circumstances of the matters discussed between them” and that “he did not detect any sign of stress or pressure”, although he

⁹ Ibid at para 670

¹⁰ Ibid at para 672

¹¹ Ibid at para 685

“acknowledged not having made direct inquiry of her in that regard”.¹² He also acknowledged that he did not review the transfer document with the plaintiff at or before the execution.¹³

After reviewing the evidence and the relevant case law, Justice Puddestar found that there was “indicia of undue influence” present which “suggest[ed] that the situation as a whole was one which called for an **extra degree of care and inquiry** by the defendant in terms of exactly what were the interests, intentions and understandings of the plaintiff.”¹⁴ The Court found, among other things, that the solicitor had not properly advised the plaintiff of the possible concerns of transferring most of her assets to her nephew,¹⁵ and “failed to exercise the required degree of care . . . with respect to a specific inquiry as to the existence of any pressure from the nephew or otherwise”.¹⁶ The plaintiff was awarded damages of \$14,000.00 equaling the sale price of the property minus certain monies already returned to the plaintiff.¹⁷ The court found there to be a degree of ‘special relationship’ between the plaintiff, the concerned relationship at the time of the dealing with the solicitor.¹⁸

The court emphasized the presence of *indicia* of undue influence, and although the court concluded that any presumptions could be rebutted, a lawyer in those circumstances would have to exercise extra caution in his/her dealings.¹⁹ The court specifically stated that the situation was one which “called for an extra degree of care and inquiry by the [solicitor] in terms of exactly what were the intentions and understandings of the plaintiff.”²⁰

Finally, and importantly, the court concluded that case law establishes that there is an onus on the solicitor, in properly representing his/her own client, so as to ensure as clearly as can be established that the client “was fully aware of the circumstances and

¹² *Ibid.* at para. 56.

¹³ *Ibid.* at para. 587.

¹⁴ *Ibid.* at para. 633.

¹⁵ *Ibid.* at para. 692.

¹⁶ *Ibid.* at para. 612.

¹⁷ *Ibid.* at para. 967.

¹⁸ *Ibid.* at para 624

¹⁹ *Ibid.* at para 633

the consequences of his act and that there was no undue influence.”²¹ [*Gammon et al v Steeves et al*]. The duty of the independent advisor is not merely to satisfy himself that the donor understands the effect of and wishes to make the gift, but to protect the donor from himself as well as from the influence of the donee. A solicitor who is called upon to advise the donor must satisfy himself that the gift is one that is right and proper in all of the circumstances of the case [p. 394, *Halsbury, Miller A.C.J. per Tulick Estate v Ostapowich*]²²

Accordingly, the court concluded there is substantial obligation on the solicitor to make full enquiry of the donor’s circumstances regarding the “prudence” of the transaction.²³

The further relevant excerpts from this case which provide guidance on a solicitor’s responsibility in cases suggestive of undue influence are:

“[533] As noted, most of the cited authorities respecting the concept of undue influence deal with situations where the claim by or on behalf of the donor is against the recipient of the gift or transfer, seeking its return. These cases do not decide the question as to whether a solicitor acting in the matter has incurred liability either to the donor - if the claim for return is unsuccessful, or to the donee if the claim succeeds. (Logically, claims of the latter nature would be few and far between, since as will be noted, the rendering of legal advice solely to and for the benefit of the donor rather than the donee is often a central element in establishing the “validity” or otherwise of the transaction in question). Here the plaintiff’s claim is now not against the Nearys as the recipients of the funds in question. Rather, the sole claim at this time is against the solicitor.

[534] In terms of the few cited authorities which have considered the legal obligation of the solicitor, in Tulick Estate v. Ostapowich, supra, the claim on behalf of the donor there was brought not only against the recipient of the transfers but also against the solicitor who had prepared the documentation. In considering the steps taken - or not taken as the case may be - by the solicitor there, Miller, A.C.J., concluded as follows at p. 396:

“With this background, I cannot say that [the solicitor] met the required tests of an independent advisor in that he did not make a full and complete inquiry into all of the relevant facts. Here again, I want to stress that I have no doubts about the honesty and sincerity of [the solicitor’s] position in this matter and I think he

²⁰ Ibid. at para 633

²¹ Ibid. at para 634

²² Ibid. at para 635

²³ Ibid. at para 636

exercised his best judgment in the matter at the time of the interview. It is always easy, with the benefit of hindsight, to think of other ways of handling a given situation and to be critical of what actually happened. In the case at bar, I do not consider that [the solicitor's] conduct of the matter amounted to negligence in his role of a solicitor but, in the context of the issue between Tulick's Trustee and Ostapowich, I have come to the conclusion, for the reasons earlier mentioned, that Tulick did not receive independent advice from [the solicitor] on the day in question."

This position is interesting in light of the later conclusion in the same case that despite the absence of independent legal advice, the circumstances were such that the presumption of undue influence had been rebutted. Thus there was no basis to set aside the transaction in question. Interestingly, Miller, A.C.J., goes on to say

"Having arrived at the conclusion that the facts surrounding the transfer of the property have rebutted the presumption of undue influence by Ostapowich over Tulick, it follows that the application to set the transfer aside or to seek an accounting for the proceeds of the sale must fail. As the claim against Ostapowich has failed, I cannot see how the claim for damages against [the solicitor] can succeed and it too must be dismissed." (p. 400) (my emphasis)

It appears that the court in Tulick Estate had found a second basis to deny the claim against the solicitor (having earlier found, as noted, that the solicitor was not in fact negligent, although failing to provide independent legal advice). While on one analysis it may appear curious that the court would secondarily link the solicitor's negligence to whether undue influence in fact existed or not, logically it might be explained when it is remembered that in the absence of undue influence the plaintiff suffered no damages. Thus the third essential element of the tort of negligence would not be made out, even had the court otherwise concluded that there was a duty which had been breached by the solicitor.

[535] In terms of the obligation to ensure independent legal advice, I shall return to that in more detail below. At this point it is significant to note that in Tulick Estate the court was apparently prepared to conclude that a failure to ensure the existence of independent legal advice does not ipso facto amount to negligence on the part of the solicitor involved, even where, presumably, there may be indicia suggestive of the possibility of undue influence, etc.

[536] In Gammon et al. v. Steeves et al., supra, although there was no claim actually advanced against the solicitor involved, the appeal court found reasonable the conclusion by the trial judge that both the defendants and the lawyer involved there "failed" to explain the true nature of the transaction to the plaintiff's. The appeal court went on to say at p. 409

"In such circumstances, the donee or his lawyer must take sufficient steps to enable them to satisfy a court that the grantor was fully aware of the

circumstances and the consequences of his act and that there was no undue influence."

[537] *Again the case considered the status of "independent legal advice" in such matters, which will be separately referred to below. However at this point, in terms of the question of the duty owed by the solicitor, the words in question suggest that where the solicitor acts either in whole or in part for the donor, there is a duty at common law to ensure that the nature of the transaction is understood.*

[538] *In Gammon et al. v. Steeves et al. the court distinguished the situation there - including the court's view as to what the solicitor failed to do - from the situation in Lawrence v. Hachey and Hachey (1982), 39 N.B.R.(2d) 517; 103 A.P.R. 517 (T.D.). During the course of judgment in the latter case the court had referred to the steps taken by the solicitor there, which included providing advice as to the most appropriate means to carry out the plaintiff's wishes, and having another member of the firm interview the plaintiff to assess the plaintiff's understanding and intentions. An interesting comment was made by that court at p. 524:*

"While it is always possible to suggest other precautions which [the solicitor] could have taken to satisfy himself that [the donor] was not being unduly pressured the steps which he did take were sufficient for him to satisfy himself and, in the circumstances, exhibited extreme caution."

However, it must be remembered that Lawrence v. Hachey et al. again did not involve a claim against the solicitor for breach of duty. The role of the solicitor there was considered essentially from the perspective of whether it could be concluded that the plaintiff had received independent legal advice sufficient to rebut the presumption of undue influence arising from the circumstances surrounding the relationship between the donor and the donee.²⁴

In ***Tulick Estate v. Ostapowich* 1988 CarswellAlta 194 (Q.B.)**, Alberta's Public Trustee, on behalf of an elderly widower, brought a claim to set aside a transfer of property that the widower had made to his nephew and claimed against the widower's former solicitor for professional negligence in the drafting and the execution of that transfer. The Trustee argued that the Court should invalidate the transfer as the widower had been unduly influenced by the nephew. The children sought damages against the solicitor for negligence.

²⁴ Ibid. at paras 538

The evidence revealed that the drafting solicitor: “satisfied himself” that the widower “wanted to gift” the property; was convinced the widower “knew what he was doing”; and questioned the widower to see if “anyone was exerting pressure” upon him to immediately transfer the property, instead of gifting it in his will as originally planned.²⁵

However, the evidence also revealed that: the solicitor had acted for the nephew on a number of occasions in the past; he may have initially taken instructions from the nephew; his notes were “sketchy”,²⁶ and he had failed to find out the nature and extent of the widower’s assets and the percentage of the assets the widower was gifting away.²⁷

While the Court concluded that the solicitor had not provided the required independent legal advice to the widower, Justice Miller did not find that undue influence existed. Commenting on the actions of the solicitor, Justice Miller observed:

With this background, I cannot say that [the solicitor] met the required tests of an independent adviser in that he did not make a full and complete inquiry into all of the relevant facts. Here again, I want to stress that I have no doubts about the honesty and sincerity of [the solicitor’s] position in this matter and I think **he exercised his best judgment** in the matter at the time of the interview. It is always easy, with the benefit of hindsight, to think of other ways of handling a given situation and to be critical of what actually happened. **In the case at bar, I do not consider that [the solicitor’s] conduct of the matter amounted to negligence in his role of a solicitor. . .**[emphasis added]²⁸

The Court also found that as no undue influence existed, “the claim for damages against [the solicitor] can[not] succeed and it too must be dismissed.” This suggest that undue influence is a condition precedent before a negligence claim can even be commenced against a drafting solicitor.²⁹

Similarly in ***Doyle v. Valente, 1993 CarswellBC 2971 (SC)*** the Court dismissed a negligence claim against a solicitor when it held that a testator had freely changed his

²⁵ *Tulick Estate v. Ostapowich* 1988 CarswellAlta 164 (Q.B.) at para. 12 [hereinafter “*Tulick*”]

²⁶ *Ibid.* at para. 13

²⁷ *Ibid.* at para. 29.

²⁸ *Ibid.*

mind and no undue influence was found. Justice Spencer concluded that “[i]t follows that [the] action against the solicitors must also be dismissed because [the testator] knew what he was doing. There is no obligation at law, nor was any suggested, for a solicitor to protect the interest of a former beneficiary from a testator’s properly formed intention to change his mind”.³⁰

In ***Brown Estate Re, 2001 CarswellOnt 1333 (S.C.J.)***, however, the court held, that a solicitor could still be sued in negligence even if the allegations of undue influence were not established. In this case, the deceased’s wife brought a claim in negligence against the solicitor who drafted her husband’s Will claiming that he had been unduly influenced by two caregivers to leave 2/3 of his estate to them. She argued that her husband’s true intentions were that she should receive his entire estate. The drafting solicitor brought a summary judgment motion seeking to stay or dismiss the claim which had been brought concurrently with a Will challenge claim. The solicitor argued that the negligence claim was “entirely contingent” upon the Will challenge and that it should be stayed or dismissed pending the outcome of that case to “avoid undue prejudice to [the solicitor]”.³¹

The Court dismissed the motion finding that the negligence claim was “not necessarily predicated upon the outcome of [the Will] challenge based on undue influence”.³² The Court observed that “even if the plaintiff’s allegation of undue influence was not established she could, presumably, still pursue her claim of negligence against [the solicitor] on the basis of his failure to discern the testator’s true intention”.³³ Unfortunately, there is no known reported decision of the outcome of the negligence claim against the solicitor.

Another recent decision addressed a solicitor’s duty in circumstances of undue influence and is still currently before the courts. In ***Vincent v. Blake, Cassels & Graydon LLP 2013 ONSC 980*** the son of the testator brought a professional

²⁹ *Tulick* supra note 25 at para. 41.

³⁰ *Doyle v. Valente*, 1993 CarswellBC 2971 (S.C.) at para. 36.

³¹ *Brown Estate Re* 2001 CarswellOnt 1333 (S.C.J.) at para. 11 [hereinafter “*Brown*”]

³² *Ibid.* at para. 20.

negligence claim against the solicitors who drafted his mother's will and completed an estate freeze. The son alleged, among other things, that his sister had unduly influenced his mother so she would benefit to a greater extent than the son, under the will and estate freeze, even though the mother's intention had been for her children to be treated equally. The son based his allegations of undue influence, in part, on the fact that the solicitors had been his sister's professional advisors for a lengthy period of time and that they had ignored the mother's request that the children be treated equally.³⁴

The defendant solicitors brought a summary judgment motion seeking to dismiss the action claiming that they owed no duty of care to the son who was a third party beneficiary.³⁵ Such a claim, they argued, would place a solicitor in direct conflict with the duty owed to his or her client: the testator.

Justice Stevenson, however, held that the question as to whether the solicitor owed a duty of care to the plaintiff beneficiary was a triable issue and refused to dismiss the action.³⁶ Her Honour agreed with the son's counsel that the case law relied upon by the solicitors could be distinguished as those cases that dealt with beneficiaries under prior wills who wished to challenge subsequent Wills. In those situations, the interests of the testator were not aligned with those of the beneficiary. Here, where the son argues that the intention of the testator was not fulfilled by the solicitors, it was not clear on the facts whether the testator's interests were in direct conflict with the son's or if they were aligned.³⁷ Therefore a trial was required. We will have to wait and see if we will gain some further insight from the court on a solicitor's duty when dealing with the potential for undue influence, actual or presumed.

After reviewing the limited cases on point, the following summary can be made:

³³ *Ibid.* at para. 20.

³⁴ *Vincent v. Blakes, Cassels & Graydon LLP* 2013 ONSC 980 at paras. 23-24 ["*Vincent*"].

³⁵ *Ibid.* at para. 32.

³⁶ *Ibid.* at para. 43.

³⁷ *Ibid.* at para. 46.

- solicitors may have a “heightened” or elevated duty when there are potential indicia of undue influence whether actual or presumed;
- it is unlikely that a negligence claim against the solicitor will succeed if undue influence is not found, unless a claim can be based in failing to discern the testator’s true intentions; and
- a third party beneficiary may have standing to commence a negligence claim against a drafting solicitor where undue influence is alleged if the beneficiary’s and the testator’s interests are aligned.

Summary: Court’s Commentary on Solicitor’s Actions in Undue Influence Claims

While the Court is not asked to make a finding of negligence in general estate claims where undue influence is alleged, often the Court will look at the actions or non-actions of the drafting solicitor, the evidence and file notes, to determine if undue influence exists. This commentary by the Court can be used as guidance to elicit some ‘best practices’. Some decisions that provide such of guidance are discussed below:

In ***Danchuk et al v. Calderwood et al* 1996 CanLII 914 (BCSC)** a housekeeper was found to have unduly influenced an elderly widower to execute powers of attorney in her favour, marry her, and execute a new will in which she was the main beneficiary. When the widower died, his children from a previous marriage brought an application to set aside the Will on the ground of undue influence, among others.

The housekeeper had consulted a telephone book to find a lawyer to draft the deceased’s Will. She booked the appointment and brought the deceased to the drafting solicitor’s office. She remained in the room during the entire meeting.³⁸

The drafting solicitor testified that she had been concerned that the housekeeper was answering all of the questions regarding the Will instead of the testator. To alleviate her concerns she asked the testator if he “understood what was occurring” to which “she thinks he answered in the affirmative” but that he “had some difficulty with the words”.³⁹

³⁸ *Danchuk v. Calderwood* 1996 CarswellBC 2555 (S.C.) at para. 64 & 71-72 [hereinafter “*Danchuk*”]

³⁹ *Ibid.* at para. 71.

The housekeeper then interjected and said she “could speak for him”. The solicitor continued the meeting with the housekeeper present. The solicitor testified that she did not find the circumstances suspicious and at no time considered interviewing them separately.⁴⁰

Justice Harvey observed that in keeping with what he understood “to be the law applicable to the duty of a solicitor, . . . [the solicitor] failed with respect to that duty.”⁴¹

The Court then set out what the solicitor *should have* done in the circumstances:

- (1) She should have regarded the circumstances as suspicious having regard to the deceased's advanced age and considerable seniority to that of the plaintiff as well as his apparent dependency upon her, including allowing her to speak for him;
- (2) she should have undertaken an inquiry, including interviewing the plaintiff and the deceased separately with regard to the age difference and as to the independence of the deceased in giving instructions;
- (3) the inquiry should have confirmed whether the deceased had a prior existing will and, if such a will existed, what were the reasons for any variations or changes therefrom prompting the disposition being put forward;
- (4) the inquiry should have encompassed why and for what reasons the deceased had given a power of attorney to his daughter in late 1992 and, more importantly, why upon revocation of that power of attorney a new power of attorney was to be given by the deceased to the plaintiff; and,
- (5) collateral to (4), *supra*, the inquiry should have included some investigation of the health of the deceased.⁴²

Justice Harvey attached little weight to the evidence of the drafting solicitor, and based on medical evidence of the testator’s dementia, refused to probate the will.⁴³

In the English case of ***Schrader v. Schrader* [2013] EWHC 466 (Ch)**, Justice Mann invalidated a will based on undue influence. The testator in question was an elderly widow at the time her Will was drafted. The Will left her house to one son, Nick, and the

⁴⁰ *Ibid.*

⁴¹ *Danchuk, supra* note 38 at para. 116.

⁴² *Ibid.* at para. 117.

⁴³ *Ibid.* at paras. 120 & 130.

minimal residue of her estate to her two sons equally. Her previous will divided her house and residue equally between her two sons.⁴⁴

The new Will was drafted, not by a solicitor, but by a “will writer”. Nick had found the Will writer in the yellow pages and arranged for her to come to his mother’s home to take instructions for a new will. The will writer spoke with the mother to understand her wishes and completed an 11 page questionnaire. In her notes, the will writer wrote “*I asked & received confirmation that she was not being put under any undue pressure or influence as to the distribution of the property. I confirmed with [the testator] while [the son] was absent from the room.*”⁴⁵ The will writer testified that this question was her normal practice.

While there was no direct evidence of coercion, Justice Mann concluded that the testator had been unduly influenced by her son based on the evidence as a whole, including the vulnerability of the mother, her dependency on her son and his violent nature and personality.⁴⁶ Justice Mann also found that he:

did not think that [the will writer’s] attempt to ascertain whether there was pressure on her, the fruits of which are recorded on her instruction form, are a particularly strong contra-indication in this case. If the more subtle form of undue influence is being applied, its victim would hardly be likely to answer “Yes” to the question.⁴⁷

Simply asking the testator if they are being pressured is not enough. A probing of the whole situation and circumstances is required.

In ***Juzumas v. Barron 2012 ONSC 7220*** Justice Lang invalidated a transfer of a property by an older adult due to undue influence. In this case a “caretaker” befriended a vulnerable older adult with limited English and eventually convinced him to marry her. The day before the wedding she took him to a lawyer he had not met previously to have a will drafted. Shortly thereafter she returned with him to the same lawyer to execute a transfer of his house to her son.

⁴⁴ *Schrader v. Schrader* [2013] EWHC 466 (Ch) at para. 1 [“*Schrader*”].

⁴⁵ *Schrader*, *supra* note 44 at para. 57.

⁴⁶ *Ibid.* at para. 97.

⁴⁷ *Ibid.*

While the Court did not directly comment on whether the actions of the drafting solicitor were negligent, Justice Lang relied partially on the solicitor's actions (and non-actions) in finding that undue influence existed. This included the fact that, despite the age difference between the parties and their impending marriage, the drafting solicitor:

- did not meet with the older adult alone, but also in the presence of the caretaker;
- met with the parties only briefly;
- was aware of the older adult's limited English;
- provided no advice directly to the older adult about the transfer and its consequences;
- did not show or explain the agreement to him, it was the lawyer's custom to give clients a "reader's digest" version; and
- spoke significantly in Polish, which the older adult did not understand but the caregiver did.⁴⁸

The lawyer had noted that the older adult was "cooperative" during the meeting which Justice Lang interpreted as suggesting that he was "acceding to someone else's direction".⁴⁹ The Court commented that the caregiver may have taken advantage of the lawyer who saw himself as a "family counsellor" of sorts.⁵⁰ The Court remarked that the solicitor did not "appreciate the power imbalance" that existed and may have been under the impression that it was the caretaker (not the older adult) who was the vulnerable party.⁵¹ Undue influence was found to exist in this case. We have no known information on any further litigation arising out of this decision as it applies to the drafting solicitor.

In ***Nguyen-Crawford v. Nguyen* 2010 ONSC 6836** a daughter took her Vietnamese speaking mother to an English speaking lawyer to have a power of attorney drafted. The daughter, who lived with the mother at that time, provided the translation of the

⁴⁸ *Juzumas v. Baron*, 2012 ONSC 7220 at para. 79-93 ["*Baron*"].

⁴⁹ *Ibid.* at para. 91.

⁵⁰ *Ibid.* at para. 46.

⁵¹ *Ibid.* at para. 88.

documents which conferred extensive powers on the daughter. The drafting solicitor did not testify at trial nor was her file produced.

The Court determined that the daughter exercised undue influence over her mother, based on the evidence that the mother was dependent upon the daughter, the daughter translated the documents, and that the daughter used the power of attorney to make risky investments.⁵² The Court declared that the power of attorney was invalid.

An interesting aspect of this case was the daughter's argument that the Court needed to find that the solicitor was negligent before it could "find that the failure to provide an independent translation of the powers of attorney and the advice concerning them invalidated those powers of attorney".⁵³ The Court rejected this argument and held that: "In the absence of [the solicitor's] notes and records or her testimony, there is simply no evidence to support any finding on this issue" of professional negligence.⁵⁴

In ***Verch et al v. Verch et al, 2013 ONSC 3018*** the Court confirmed that a solicitor's negligence claim should be a separate claim or cause of action and not determined in a Will challenge case alleging undue influence:

Counsel for the Applicants submitted that in taking instructions, preparing the Will and attending to its execution, [the lawyer's] actions fell below the expected standard. If that were so, Applicants' counsel urged that I should find that [the testator] was unduly influenced. I do not accept this submission. I find that [the lawyer] more than met the professional standard expected of him. **Furthermore, I remind myself that the issue of undue influence here to be tried relates only to the alleged actions of the Respondents or one of them and not the actions of [the lawyer] nor any other third party.**⁵⁵ [emphasis added]

In the case of ***John Gironda et al. v. Vito Gironda et al, 2013 ONSC 4133***, a son was not found to have unduly influenced his elderly mother at the time of her execution of her Will, but was found to have unduly influenced her in the transfer of her house into his name, at the relevant time, three years later.

⁵² *Nguyen-Crawford v. Nguyen* 2010 ONSC 6836 at para. 104 [hereinafter *Nguyen*].

⁵³ *Nguyen, supra* note 52 at para. 101.

⁵⁴ *Ibid.*

⁵⁵ *Verch et al v. Verch et al, 2013 ONSC 3018* at para.35.

In 2005, the elderly mother wanted to change her Will and her son, Vito, called her solicitor on her behalf to make an appointment. The solicitor told her son that, due to her age, he should take his mother to see her family doctor regarding her competency to make a Will. The doctor determined that the testator's mental competence was in his words, "Okay!" and wrote a note to the solicitor the same day. The drafting solicitor met with the mother and spoke to her about her Will and what she wanted to do. They spoke fluently in her native Calabrese.⁵⁶ The drafting solicitor testified that he understood the mother and that the mother understood him. Also, although Vito brought the mother to the interview, the solicitor was alone with the mother "pretty much all the time". The solicitor recalled that the mother was very competent mentally and was alert. He testified that she knew where her money was, knew who her sons were and came to the interview with a view already formulated about who she wanted to receive what. While the solicitor did not recall specific questions he used to test her memory and capacity he said he knew "how to approach these situations".

The Court found that the 2005 Will was valid. Despite grounds for "suspicion" of undue influence the court found that no evidence to establish undue influence on the balance of probabilities. The Court observed that: "Both her doctor and her lawyer turned their minds to whether she appeared to understand what she was doing and to be doing it of her own free will."⁵⁷

The Court also endorsed the solicitor's actions in this situation:

The lawyer met with [the mother] twice; once, to take instructions and subsequently, to review the documents he had prepared. He took her through the main points in the documents and satisfied himself that she understood what she was doing and that she was signing voluntarily. . .The fact that [the lawyer] may not have plumbed the depths of the technicalities of *per stirpes* is not a reason to find that [the mother] was either subject to undue influence. . .The fact that he had no notes of his interview may not be an indication of best practices, but it is hardly evidence that [the mother] was not meeting with him of her own volition or that she did not know what she was doing.⁵⁸

However, the 2008 transfer of her house was a different story with a different result. That transfer was completed through a different lawyer, one whom the mother had

⁵⁶ *Gironda, supra* note 5 at para. 66.

⁵⁷ *Gironda, supra* note 5 at para. 81.

never met before. The lawyer also subsequently died before the hearing of the application. Vito had placed the initial call to the new lawyer to set up the appointment. The new lawyer acted for both Vito and the mother in the transfer, and there was no evidence the mother received independent legal advice. Nor did the new lawyer seek a medical opinion on the mother's capacity. He also made few notes which were found to be "cryptic at best".⁵⁹ The Court observed that what the lawyer "did to satisfy himself that [the mother] knew what she was doing, and doing so of her own free will, has been lost with his death".

Six months after that transfer, the mother was back at the new lawyer's firm to change her Will. This time an associate and an articling student interviewed the mother. The lawyer and student could not get the mother to provide clear instructions and declined to draft a new Will for her.

The Court found that, based on medical evidence, and the evidence regarding the mother's meetings with the lawyer, that the transfer of her home to Vito was invalid as she lacked capacity and she was unduly influenced to do so.

In ***Kavanaugh v. Lajoie*, 2013 ONSC 7** the court affirmed the actions of a solicitor in an application where it was alleged that that an older adult had been unduly influenced by his daughter to transfer land into her name. The Court found the transfer to be valid and that the allegations of undue influence were not substantiated, partly based on the drafting solicitor's testimony.

The drafting solicitor testified that if he ever had any concerns as to why a testator was leaving more to one child over another it was his "practice to inquire whether the testator is under any pressure to divide it unequally."⁶⁰ The lawyer met with his client alone and specifically asked him on more than one occasion whether the transfer "was truly his intention" and if he was being pressured by his daughter.⁶¹ His client denied being pressured and "did not appear to [the solicitor] to be under pressure". While the

⁵⁸ *Ibid.* at para. 87-88.

⁵⁹ *Ibid.* at para. 106.

⁶⁰ *Kavanaugh v. Lajoie* 2013 ONSC 7 at para.80 ["*Kavanaugh*"]

⁶¹ *Ibid.* at para. 95.

solicitor testified that he uses a questionnaire for capacity issues for drafting wills he did not use such a checklist for real estate issues.

The Court found that while the daughter had an “influence with her father and attempted on occasion to influence him” she “did not have a persuasive or dominating influence over the will” of her father. With respect to the solicitor’s conduct the court observed:

He is experienced in the area of wills and separation of family property and **was sensitive to the issue of capacity and undue influence**. His presence alone in his office with [his client] satisfies this Court that any influence [the daughter] attempted to direct towards the final outcome would be countered by the advice of [the solicitor] and **his sensitivity to the issue of undue influence**.⁶² [emphasis added]

The Ontario Court of Appeal recently upheld and affirmed the trial judge’s decision.⁶³

Concluding Comments:

These decisions suggest that the drafting solicitor must show, through actions, that he/she “turned their mind” to issues of undue influence in order to discharge the duty owed and meet the standard of care expected. What is not clear is what actions a solicitor must take to show that they were sensitive to these issues. Guidelines can be gleaned from the Court’s affirmation or criticism of solicitors’ actions as summarized above:

In cases where the Court found undue influence, the solicitor, among other things:

- (a) ignored the fact that extensive “family squabbles” existed;⁶⁴
- (b) did not meet with the client alone;⁶⁵
- (c) failed to take proper notes;⁶⁶
- (d) did not inquire if the client was being pressured or simply asked if they were being pressured without any follow-up probing;⁶⁷ and

⁶² *Ibid.* at para. 147.

⁶³ 2014 ONCA 187.

⁶⁴ *Kosowan v. Berezowski* 1997 CanLII 11142 SKQB.

⁶⁵ *Kosowan v. Berezowski* 1997 CanLII 11142 SKQB

⁶⁶ *Slobodianak v. Podlasiewicz* 2003 MBCA 74.

(e) did not question significant changes to a will or power of attorney.⁶⁸

In cases where the Court did not find sufficient evidence of undue influence, the solicitor:

- (a) met with their clients alone⁶⁹
- (b) and on more than one occasion;⁷⁰
- (c) did not have any contact with the alleged influencer;⁷¹
- (d) took proper notes;⁷²
- (e) included paragraphs in the will explaining the differential treatment of children;⁷³ and
- (f) was “alert” or “attuned” to concerns of language difficulties and undue influence.⁷⁴

It is important for all solicitors to be cognizant of their potentially heightened duty to ensure that their client’s instructions are free of coercion or undue influence. Below is a helpful non-exhaustive checklist to assist in discharging that duty.

Drafting Lawyer’s Checklist of Circumstantial Inquiries

Checklist

- Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- Is there conflict within your client’s family?
- If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?
- If the client is isolated, does he/she live with one particular individual?

⁶⁷ *Hussey, supra* note 8 and *Schrader, supra* note 44.

⁶⁸ *Danchuk, supra* note 38.

⁶⁹ *Maddess v. Racz*, 2008 BCSC 1550

⁷⁰ *Raynyshyn et al. v. Drys et al*, 2005 BCSC 561

⁷¹ *Maddess v. Racz*, 2008 BCSC 1550.

⁷² *Leung v. Chang* 2013 BCSC 976, affirmed 2014 BCCA 28.

⁷³ *Maddess v. Racz*, 2008 BCSC 1550.

⁷⁴ *Raynyshyn et al. v. Drys et al*, 2005 BCSC 561; *Leung v. Chang* 2013 BCSC 976, affirmed 2014 BCCA 28; and *Kavanaugh, supra* note 60.

- Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?
- Based on conversations with your client, his/her family members or friends, what are his/her character traits?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
- If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.
- Have numerous successive planning documents of a similar nature been made by this client in the past?
- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- Has the client had any recent significant medical events?
- Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?
- In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?
- Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

- Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependency? Is the client in some way susceptible to external influence?
- Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
- Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Legal/Medical Checklist

A comprehensive checklist that takes into consideration both medical-legal factors, where testamentary capacity is at issue was published by: Dr. Kenneth Shulman, Carole Cohen, Felice Kirsh, Ian Hull and Pamela Champine, in their article: "Assessment of Testamentary Capacity and Vulnerability to Undue Influence." That checklist is reproduced as follows to provide further guidance:

1. *"Rationale for any dramatic changes or significant deviations from the pattern identified in prior wills or previous consistently expressed wishes regarding disposition of assets.*
2. *The appreciation of the consequences and impact of a particular distribution, especially if it deviates from or excludes "natural" beneficiaries, such as close family members or spouses.*
3. *Clarification of concerns about potential beneficiaries who are excluded from the will or bequeathed lower amounts than might have been expected—that is, ruling out the presence of a specific delusion or overvalued idea that influences the distribution.*
4. *Evidence of the presence of a specific neurologic or mental disorder that may affect cognition, judgment, or impulse control.*
5. *Evidence of behavioral disturbances or psychiatric symptoms at the time of the execution of a will, for example, behavioral and psychological symptoms of dementia such as agitation, impulsiveness, disinhibition, aggression, hallucination, and delusions.*
6. *The emotional/psychological milieu in which the testator lives, with specific reference to conflicts or tensions within the family, documenting the complexity and conflictual level of situation-specific factors.*

7. *The testator's understanding and appreciation of any conflicts or tensions in his or her environment.*
8. *Evidence of a pathological or dependent relationship with a formal or informal caregiver, such as a younger woman who offers comfort and reassurance or plants seeds of suspiciousness toward family or friends.*
9. *Evidence of inconsistency in expressed wishes or an inability to communicate a clear, consistent wish with respect to the distribution of assets; for example, frequent will changes are sometimes made in a desperate attempt to garner care, support, or comfort at a time when the testator feels increasingly vulnerable or threatened.*
10. *any of the indications of undue influence.*

Questions to Ask

The following specific questions posed to the testator may help in elucidating and probing the relationship between task-specific and situation-specific factors:

1. *Can you tell me the reason(s) that you decided to make changes in your will?*
2. *Why did you decide to divide the estate in this particular fashion?*
3. *Do you understand how individual A might feel, having been excluded from the will or having been given a significantly less amount than previously expected or promised?*
4. *Do you understand the economic implications for individual B of this particular distribution in your will?*
5. *Can you tell me about the important relationships in your family and others close to you?*
6. *Can you describe the nature of any family or personal disputes or tensions that may have influenced your distribution of assets.⁷⁵*

Substantive Inquiries

⁷⁵ Treatment in Psychiatry, Assessment of Testamentary Capacity and Vulnerability to Undue Influence, Am J Psychiatry 164:5, May 2007, by Kenneth I. Shulman, Carole A. Cohen, Felice C. Kirsh, Ian M. Hull and Pamela R. Champine, page 724-725

- Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- Is the client making a marked change in the planning documents as compared to prior documents?
- Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?
- Does the client have a physical impairment of sight, hearing, mobility or other?
- Is the client physically dependant on another?
- Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

When taking instructions from a client in respect of a planning document, the following are some recommended guidelines to assist in minimizing the risk of undue influence:

- Interview the client alone;
- Obtain comprehensive information from the client, which may include information such as:
 - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
 - (ii) Any previous planning documents and their contents, copies of them.
- Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);
- Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;
- Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;

- Address recent health changes;
- Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;
- Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;
- Determine whether the client has any physical impairment? Hearing, sight, mobility, limitations ...?
- Consider evidence of intention and indirect evidence of intention; and
- Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

General Practical Tips for Drafting Lawyers – Checklist:

- Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;
- Determine Intentions;
- Where capacity appears to be at issue, consider the efficacy of and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);
- Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;
- Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings

towards that other individual, it may be an indicator that undue influence is at play;

- Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;⁷⁶ and
- Be mindful of the applicable *Rules of Professional Conduct*⁷⁷ in the lawyer's jurisdiction.

See Undue Influence Checklist on WEL website:

<http://whaleyestatelitigation.com/blog/?s=checklist+>

This paper is intended for the purposes of providing information and guidance only. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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⁷⁶ For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", <http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf>

* For other related resources, see WEL "Publications, Website": www.whaleyestatelitigation.com

⁷⁷ *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>